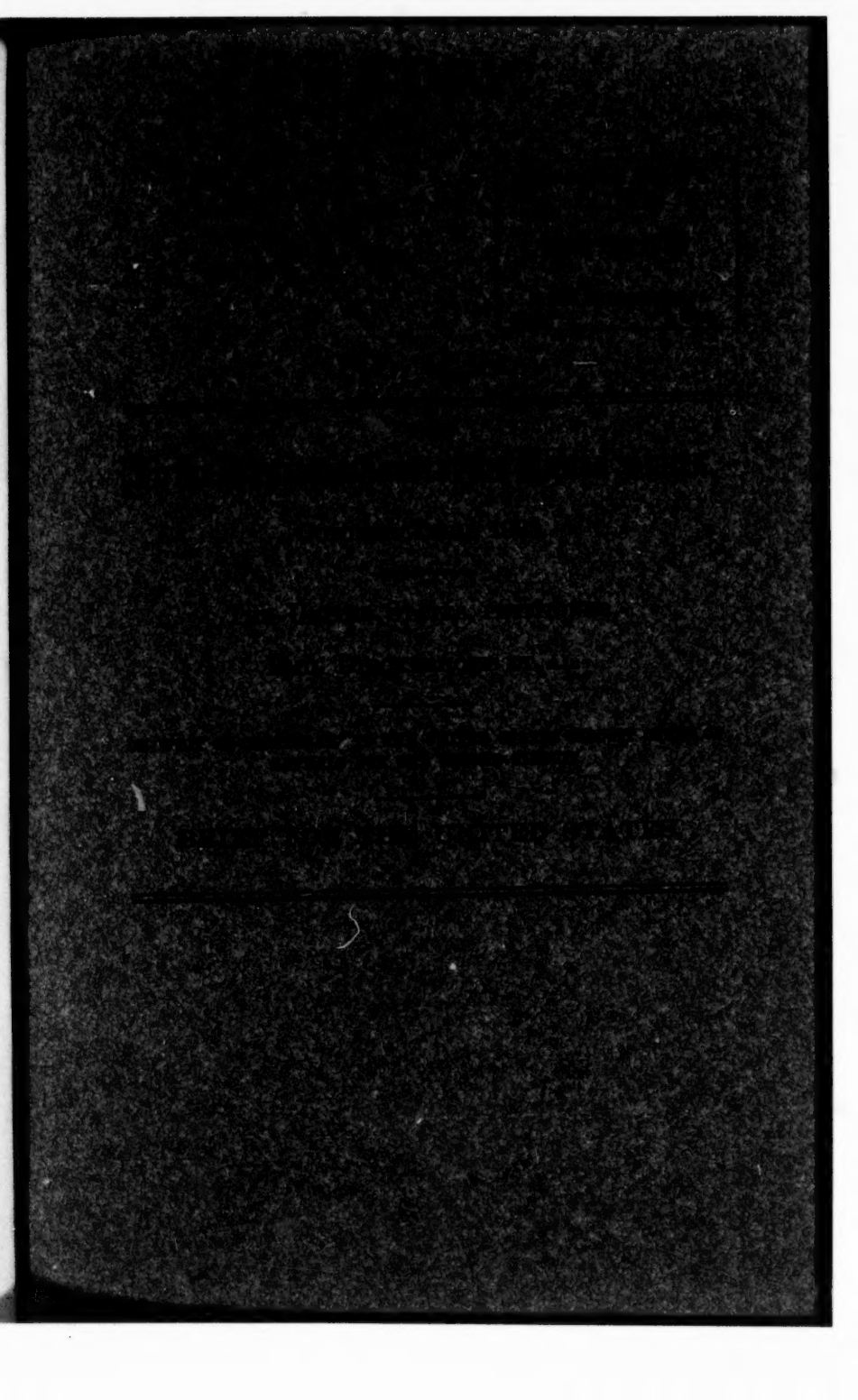

In the Supreme Court of the United States.

OCTOBER TERM, 1905.

THE UNITED STATES, PETITIONER,
v.
EMIL DIECKERHOFF ET AL. } No. 228.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

BRIEF FOR THE UNITED STATES.

STATEMENT.

This is an action at law brought by the United States on a custom-house or redelivery bond taken by authority of section 2899, Revised Statutes.

Respondents, partners under the name Dieckerhoff, Raffloer & Co., were importers at New York. For their own convenience they voluntarily executed, December 21, 1896, a bond, the essential parts of which follow (R., 12):

> *Bond for six months to cover the delivery of unexamined packages.*
>
> Know all men by these presents that we, Dieckerhoff, Raffloer & Co., as principals, and John Achelis and Carl F. Boker, as sureties, are held and firmly bound unto the

United States of America in the sum of fifty thousand dollars, for the payment whereof to the United States we bind ourselves, our heirs, executors, administrators, and assigns, jointly and severally, firmly by these presents, as witness our hands and seals this twenty-first day of December, eighteen hundred and ninety-six.

The condition of this obligation is such that if each and every package or packages of each and every importation made by the said principals at any time within six months from and after the date of these presents and delivered from the custody of the officers of the customs in pursuance of section 2899, Revised Statutes of the United States, shall, within ten days after the package or packages designated by the collector and sent to the public store to be opened and examined have been appraised and reported to him, be returned to the order of the collector without having been opened except with the consent of the collector or surveyor, given in writing, and then in the presence of one of the officers of the customs; or if the above-bounden obligors shall, in lieu of such return, pay to the proper collecting officer of said port double the estimated value of the package or packages of merchandise not so returned, then this obligation is to be void, otherwise to remain in full force and virtue.

And the above-bounden obligors do, for themselves, their heirs, executors, administrators, and assigns, jointly and severally covenant and agree with the United States

> that the collector of customs aforesaid shall indorse on this bond the estimated value of each importation as made, and the date thereof, and that the penalty of this bond shall be held to be double the value of each importation as made and indorsed as aforesaid; and that the value of the importation, where there is no violation of the conditions of this bond, shall not in any way affect the liability in those cases where there shall be a violation thereof. (R., 12.)

On January 13, 1897, they imported per steamship *Bovic* and entered at the New York customhouse 7 packages of merchandise (described in two invoices), numbered 417 to 421, 983, and 984. The collector designated package 418 to be sent to the public stores for examination and appraisal; the others were delivered in pursuance of section 2899, Revised Statutes; and the estimated value of the whole importation ($1,522) was indorsed on the aforementioned bond (R., 13, 14).

On January 18—within ten days after package 418 was examined and appraised—the collector ordered respondents to return package 420. They failed so to do (R., 13). Suit upon the bond was instituted and judgment asked for $3,044—twice the estimated value of the imports. The value of package 420 was alleged as $185, and the value of all the goods included in the same invoice with 420 was stated to be $806 (R., 8).

The Circuit Court overruled respondents' demurrer and held that "upon the complaint as it stands,

plaintiff, unless further answer is made, is entitled to recover, as liquidated damages, double the estimated value of the packages called for and not returned" (R., 19, 20).

An answer was filed denying breach of the bond and also that the United States had suffered any actual damage (R., 9). On the trial before a jury a custom-house clerk testified, over respondents' objection, that the value of package 420, as estimated from the original invoice, was $184.56; and further, that the only indorsement on the bond above set out was "Vessel, *Bovic;* where from, Liverpool; amount, $1,522" (R., 13). It was admitted that the collector unsuccessfully called for the return of package 420. Respondents offered no evidence (R., 13, 14).

Counsel conceded there was no proof that the United States suffered any actual damage by the failure to return package 420, and that no such proof could be made (R., 13).

The court having denied respondents' motion to direct a verdict, directed one in favor of the Government for twice the estimated value of the unreturned package, $369.12 (R., 13, 14).

The Circuit Court of Appeals reversed the lower court and remanded the cause. Two of the judges were of opinion that judgment could be given only for the actual damage which the Government could establish; the third judge maintained that the measure of damage was the value of the package asked for and not returned (R., 22, 26).

STATUTES.

Prior to 1823 no statute provided generally for appraising imports. Appraisals were directed where there was no invoice, of damaged goods, and in cases of suspected fraud. (*Greely* v. *Thompson*, 10 How., 225, 235, 236).

The act of March 1, 1823, c. 21, sec. 15 (3 Stats., 729, 735) required one package out of every invoice and at least one of every twenty to be examined, and if it did not correspond with the invoice or was falsely charged, a full inspection was directed.

A similar provision was in the act of May 28, 1830, c. 147, sec. 4 (4 Stat., 409, 410), which also provided for delivering packages not held for examination upon the giving of a redelivery bond. This is the original of section 2899, Revised Statutes.

The act of August 30, 1842, c. 270, sec. 21 (5 Stat., 565), provided for examination, forfeiture, etc., and increased the number of packages to be examined to at least one out of every ten. It became section 2901, Revised Statutes.

The act of July 27, 1866, c. 284, sec. 1 (14 Stat., 302), contained specific directions concerning examination and appraisement. It became section 2939, Revised Statutes.

The Revised Statutes contain the sections following:

> SEC. 2899. No merchandise liable to be inspected or appraised shall be delivered from the custody of the officers of the customs until the same has been inspected or appraised, or

until the packages sent to be inspected or appraised shall be found correctly and fairly invoiced and put up, and so reported to the collector. The collector may, however, at the request of the owner, importer, consignee, or agent, take bonds, with approved security, in double the estimated value of such merchandise, conditioned that it shall be delivered to the order of the collector, at any time within ten days after the package sent to the public stores has been appraised and reported to the collector. If in the meantime any package shall be opened, without the consent of the collector or surveyor given in writing, and then in the presence of one of the inspectors of the customs, or if the package is not delivered to the order of the collector, according to the condition of the bond, the bond shall, in either case, be forfeited.

SEC. 2901. The collector shall designate on the invoice at least one package of every invoice, and one package at least of every ten packages of merchandise, and a greater number should he or either of the appraisers deem it necessary, imported into such port, to be opened, examined, and appraised, and shall order the package so designated to the public stores for examination; and if any package be found by the appraisers to contain any article not specified in the invoice, and they or a majority of them shall be of opinion that such article was omitted in the invoice with fraudulent intent on the part of the shipper, owner, or agent, the contents of the entire package in which the article may be, shall be liable to

seizure and forfeiture on conviction thereof before any court of competent jurisdiction; but if the appraisers shall be of opinion that no such fraudulent intent existed, then the value of such article shall be added to the entry, and the duties thereon paid accordingly, and the same shall be delivered to the importer, agent, or consignee. Such forfeiture may, however, be remitted by the Secretary of the Treasury on the production of evidence satisfactory to him that no fraud was intended.

SEC. 2939. The collector of the port of New York shall not, under any circumstances, direct to be sent for examination and appraisement less than one package of every invoice, and one package at least out of every ten packages of merchandise, and a greater number should he, or the appraiser, or any assistant appraiser, deem it necessary. When the Secretary of the Treasury, however, from the character and description of the merchandise, may be of the opinion that the examination of a less proportion of packages will amply protect the revenue, he may, by special regulation, direct a less number of packages to be examined.

ARGUMENT.

I.

The purpose of Congress, clearly expressed in section 2899, Revised Statutes, is that all imports shall be held pending examination, except when the collector, upon the owner's request, may decide, in view of all the facts presented, that sample packages can be re-

lied on to reveal the nature of all. The collector can not finally decide whether such packages are representative until he has examined them and the attested invoice. To expedite deliveries and favor importers the statute permits them—the collector assenting—to withdraw their merchandise, except the samples, provided bond be given to return the same within ten days if called for. The manifest purpose is to subject *all* the imports to inspection whenever the Government officers conclude that course is proper; and the bond with a heavy penalty is intended to insure the return for scrutiny of what was voluntarily withdrawn.

The redelivery bond taken upon request of the importer is purely voluntary. By means of it goods are withdrawn from custody, and its special function is to secure their return thereto in the original condition when wanted, to be dealt with according to law. Much more is involved than mere pecuniary loss to the Government. The articles may be contraband; they may be necessary evidence to punish perjury; they always furnish the best means of ascertaining values, false descriptions, etc.

Section 2899, Revised Statutes, permits demand for a separate, complete bond for each importation; but this would entail much inconvenience upon large importers, and the Secretary of the Treasury, by regulation dating back to 1857 (Customs Regulations, article 391), allows a general bond upon which the value of any consignment may be endorsed. In the present case all parties voluntarily assented to the

arrangement and the matter stands as if a single bond of like tenor for twice the value of the merchandise had been executed.

Package No. 420 worth, according to the invoice, $184.56, was not returned and admittedly the condition of the bond was broken.

The point in question is, What is the measure of the recovery to be allowed? Four answers have been put forward—

First, the actual loss sustained by the Government, to be shown by proof;

Second, actual value of the unreturned package;

Third, twice the value of the package demanded and not returned;

Fourth, the full penalty of the bond, double the value of the consignment.

The first and second suggestions are based upon the idea that the bond was given alone to secure the Government against money loss, susceptible of estimate, which, being paid, would perfect the real purpose of the arrangement.

In *Clark* v. *Barnard* (108 U. S., 436) this court, after reviewing the authorities and discussing the principles involved, announced a doctrine directly in conflict with such idea. There the State of Rhode Island was permitted to enforce the full penalty of a bond for $100,000 conditioned to complete within a specified time a railroad authorized by statute. The bond was breached but no damage was occasioned to the State or to any of its citizens; and the claim was

that therefore no recovery was possible. Speaking by Mr. Justice Matthews this court said (p. 459):

> The first of these (considerations) is that it was not intended by the parties * * * that the obligation given and accepted should be for an indemnity against any loss or damage expected to be suffered by the State, in the event that the railroad company should fail to build the railroad as required. It is found as a fact that no such loss or damage has in fact ensued. It is equally plain that none could possibly have arisen. * * *
>
> (P. 460.) The conclusion, in our opinion, can not be resisted that the intention of the parties in the transaction in question was that, if the railroad should not be built within the time limited, the corporation should pay to the State, absolutely and for its own use, the sum named in the bond and secured by the deposited certificate of indebtedness. * * *
>
> (P. 461.) In the second place, we think that the sum named in the statute is imposed by it as a statutory penalty for the nonperformance of a statutory duty. The obligation required is that the railroad company shall give a bond, with satisfactory security, that they will obey the law; that they will complete their road as required by it.

The opinion in the foregoing case presents an elaborate discussion of the legal questions now involved.

In *The steamship Oteri* (67 Fed., 146, 151) the Circuit Court of Appeals, Fifth Circuit, followed the doctrine announced in *Clark* v. *Barnard*. Section 2979, Revised Statutes, requires an importer withdrawing

goods for export to give the collector "satisfactory security" that the merchandise shall be landed out of the United States. Treasury regulations provide for a bond "with satisfactory security in a penal sum equal to double the amount of the estimated duties on the goods," and one was given for a thousand dollars without referring to amount of duties. The court held "that the said bond is not one in which equity, under the facts admitted, can relieve the obligors from payment of the full penalty stipulated."

See also—

Smythe v. *United States*, 188 U. S., 156.
Nilson v. *Jonesboro*, 57 Ark., 168, 177.
State v. *Hall*, 70 Miss., 678, 682.
United States v. *Montell*, Taney's Cir. Ct. Dec., 47.
United States v. *Hatch*, 1 Paine, 336.
United States v. *Pingree*, 1 Sprague, 339.
Andrews' Revenue Laws, 102.

One may not complain that a judgment against him is less than the law allows. If, therefore, accepting the third answer above specified, the court gave judgment for twice the value of the sample package when it should have been double the value of all, such action must be affirmed.

The bond actually executed in the present case (R., 12) contains a clause providing "or if the above-bounden obligors shall, in lieu of such return, pay to the proper collecting officer of said port double the estimated value of the package or packages of mer-

chandise not so returned, then this obligation is to be void."

In view of that clause and the indicated understanding of the parties I submit the Government pursued the proper course by asking judgment for only twice the value of the package called for. (R., 13, 14.) That was clearly just.

But if the bond as executed had strictly followed the language of section 2899 I further submit that under the authority of *Clark* v. *Barnard* the Government would have been entitled to demand a judgment for twice the estimated value of the goods in the invoice which contained the unreturned package. (Secs. 2901, 2939, R. S.)

It is clearly established that courts of equity will not interfere in cases of forfeiture for the breach of covenants and conditions when there can not be any just compensation.

Story Eq. Juris., §§ 1324, 1326.
Pomeroy Eq. Juris., § 381.

II.

The clause authorizing discharge of the bond upon payment of double the estimated value of any unreturned package is not specifically provided for by section 2899, Revised Statutes; but it is not prohibited and, being less onerous than what might have been demanded, one who voluntarily assented thereto may not complain on that account.

Moses v. *United States* (166 U. S., 571, 586):

> The consideration or condition of the bond must not be in violation of law; it must not run counter to any statute; it must not be either *malum prohibitum* or *malum in se*. Otherwise and for all purposes of security, a bond may be valid though no statute directs its delivery.

The Secretary of the Treasury or his agent, the collector, has authority to take common-law bonds and to stipulate for liquidated damages therein.

United States v. *Tingey*, 5 Pet., 115.
United States v. *Bradley*, 10 Pet., 343.
United States v. *Hodson*, 10 Wall., 395.
Jessup v. *United States*, 106 U. S., 147.
Constable v. *National Steamship Co.*, 154 U. S., 79.
The S. Oteri, 67 Fed., 146.
Stephenson v. *Monmouth Min. & Mfg. Co.*, 84 Fed., 115.
Grady v. *United States*, 98 Fed., 240.

In *United States* v. *Tingey* the court said (5 Pet., 127):

> It is obvious that the condition of the present bond is not in the terms prescribed by the act of 1812, chapter 47, and it is not limited to the duties or disbursements of Deblois as purser, but creates a liability for all moneys received by him and for all public property committed to his care, whether officially, as purser, or otherwise. Upon this posture of the case a question has been made and elaborately argued at the bar how far a bond, voluntarily given to

> the United States, and not prescribed by law, is a valid instrument, binding upon the parties in point of law; in other words, whether the United States have, in their political capacity, a right to enter into a contract, or to take a bond, in cases not previously provided for by some law. Upon full consideration of this subject, we are of opinion, that the United States have such a capacity to enter into contracts. It is, in our opinion, an incident to the general right of sovereignty; and the United States being a body politic, may, within the sphere of the constitutional powers confided to it, and through the instrumentality of the proper department to which those powers are confided, enter into contracts not prohibited by law, and appropriate to the just exercise of those powers.

If the clause permitting payment of twice the value of an unreturned article is invalid the defect is cured by those provisions in the bond which follow the language of the statute. The conditions being severable, the authorized one is good. (*United States* v. *Mora*, 97 U. S., 413.)

III.

Two points heretofore made in behalf of respondents and which may be further relied upon may be properly noticed.

It is maintained that *Clark* v. *Barnard* and similar cases are not controlling because they had reference to bonds or statutes wherein the amount to be recovered

was absolutely fixed, while in the case at bar the agreement of the parties was that the collector should estimate the value of each importation and that twice such estimate should be the penalty. In other words, it is said that here no statute or agreement under seal fixes the punishment, but that a customs officer estimates the value as he pleases and thereby fixes a statutory penalty for violation of law. Respondents conclude no statute can ever be passed in this country which will provide such punishment, and that no sane parties will ever contract for any such thing.

Section 2899, Revised Statutes, expressly provides that the penalty of the bond shall be double the estimated value of the merchandise. It is apparent, therefore, Congress intended the estimates should govern. The bond is purely voluntary and to be made after the valuation is fixed. If the importer does not wish to incur the penalty he is at perfect liberty to leave the goods in custody; and after having withdrawn them he can escape liability by returning them, unopened, upon demand, as the law requires. The very purpose of the bond is to insure such return, and for that reason the penalty is made large.

Respondents further claim that they are protected against a judgment for the full penalty by the Revised Statutes, which provide:

> Sec. 961. In all suits brought to recover the forfeiture annexed to any articles of agreement, covenant, bond, or other specialty, where the forfeiture, breach, or nonperform-

> ance appears by the default or confession of the defendant, or upon demurrer, the court shall render judgment for the plaintiff to recover so much as is due according to equity. And when the sum for which judgment should be rendered is uncertain, it shall, if either of the parties request it, be assessed by a jury.

A harsh remedy is not necessarily inequitable and a court of chancery will not for that reason alone refuse to enforce it. Experience has demonstrated that mild treatment does not always secure obedience to law.

Section 961, R. S., is substantially in the language of section 26 of the judiciary act of 1789 (1 Stat., 87). It is expressly confined to three cases—default, confession, or demurrer—and has no application where there is a trial upon pleadings and proof.

Farrar v. *United States*, 5 Pet., 373, 385.

Ives v. *Merchants Bank*, 12 How., 159, 164.

The enactment was occasioned by the old doctrine under which a court of law always gave judgment for the full penalty of the bond when any breach was shown, and its purpose is to permit relief in proper cases without a proceeding in equity. Whenever, therefore, under equitable rules no relief from a penalty would be given, section 961 can have no application.

When any penalty or forfeiture is imposed by statute upon the doing or omission of a certain act then a court of equity will not interfere to mitigate the penalty or forfeiture, if incurred; for it would be

in contravention of the direct expression of the legislative will. (Story Eq. Juris., § 1326.)

Clerk v. *Barnard* seems to make it entirely clear that a court of chancery would not interfere with enforcement of the penalty provided in the bond sued on in the present case.

I respectfully ask that the action of the Circuit Court of Appeals be overruled and the judgment of the Circuit Court be affirmed.

J. C. McREYNOLDS,
Assistant Attorney-General.

MARCH, 1906.

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